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IN THE

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., *et al.*,

Petitioners,

v.

GROKSTER, LTD., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE OFFICE OF THE COMMISSIONER OF BASEBALL, NATIONAL BASKETBALL ASSOCIATION, AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., PROFESSIONAL PHOTOGRAPHERS OF AMERICA, INC., DIRECTORS GUILD OF AMERICA, WRITERS GUILD OF AMERICA, WEST, INC., SCREEN ACTORS GUILD, ASSOCIATION OF AMERICAN PUBLISHERS, INC., ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, PRODUCERS GUILD OF AMERICA, INC., GRAPHIC ARTISTS GUILD, ENTERTAINMENT SOFTWARE ASSOCIATION, VIDEO SOFTWARE DEALERS ASSOCIATION, INTERACTIVE ENTERTAINMENT MERCHANTS ASSOCIATION AND THE AUTHORS GUILD, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTERESTS OF AMICI CURIAE[1]

Amici are 15 separate organizations that represent thousands of members whose livelihood or businesses depend upon meaningful copyright protection. Their members include individuals and corporate entities who are involved in creating and making available to the American public a wide variety of copyrighted works – motion pictures, television programming, sports programming, literary works, interactive video games and photographic art. As discussed at pages 4-9, *Amici's* members are subject to the same Internet piracy that plagues the motion picture and music industry Petitioners and that the Ninth Circuit, in its decision below, effectively permits to continue unabated. *Amici* are most concerned that the Ninth Circuit's novel and incorrect view of the secondary copyright liability doctrine will adversely affect their ability to protect copyrighted works in a digital environment.

SUMMARY OF ARGUMENT

Amici agree with Petitioners that the Ninth Circuit's decision below is inconsistent with the Court's decision in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("*Sony-Betamax*"), and that it creates a square conflict with the Seventh Circuit's decision in *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004) ("*Aimster*"). However, *Amici's* purpose in submitting this brief is to bring to the Court's attention three additional reasons that support granting the petition for a writ of certiorari.

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1. Letters from all parties consenting to the filing of this brief are on file with the Clerk of the Court. No person or entity, other than Amici, their members and their counsel, made a monetary contribution to the preparation or submission of this brief. No counsel for a party in this matter authored this brief in whole or in part. Counsel for Amici represent certain of the Petitioners and the Recording Industry Association of America in matters other than this case, and they represent certain of the Amici in matters in addition to this case.

1. As the Register of Copyrights has observed, "the most important issue facing our copyright system today [concerns] new services that employ peer-to-peer technology to create vast, global networks of copyright infringement."[2] The determination of whether such services are secondarily liable for copyright infringement under *Sony-Betamax* will have a profound impact upon numerous individuals and businesses in addition to the Petitioners and Respondents, including those represented by *Amici*. A significant segment of the American economy (both copyright industries and technology industries) and the public at large have a substantial stake in the outcome of this case.

2. The Court should not wait for Congress to deal with what the Register has correctly recognized as judicial "confusion" over the applicability of *Sony-Betamax* to peer-to-peer services. Register's Statement at 2. Secondary copyright liability is a judge-made, and not legislative, doctrine. Its origins are found not in any piece of copyright legislation but rather in judicial decisions that go back more than 100 years. Congress has periodically considered the appropriate copyright treatment of particular technologies, including peer-to-peer services. Congress, however, has consistently deferred to the courts the responsibility for clarifying and setting the boundaries of the secondary copyright liability doctrine. Just as the Court articulated and applied that common law doctrine twenty years ago in *Sony-Betamax*, the Court should do the same here in a case that (a) will determine whether the doctrine will have any viability in a digital environment; and (b) involves facts and circumstances dramatically different than those present in *Sony-Betamax*.

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2. *The International Inducement of Copyright Infringements Act of 2004: Hearing on S. 2560 Before the Senate Comm. on the Judiciary*, 108th Cong. (2004) (statement of the Hon. Marybeth Peters, Register of Copyrights, U.S. Copyright Office), *http://www.copyright.gov/docs/regstat072204.html* (visited Oct. 25, 2004) ("Register's Statement"), at 1.

3. The decision below leaves *Amici* with an untenable Hobson's choice for responding to millions of acts of copyright infringement that Respondents and other peer-to-peer services make possible – either flood the federal courts with multiple lawsuits against individual infringers (as some copyright owners have already been forced to do) or permit that infringement to go unchallenged. Because this case has substantial implications for the administration of our judicial system and for the basic rights guaranteed by the Constitution's copyright clause, review by the Court is especially appropriate.

ARGUMENT

I. THE DECISION BELOW RAISES A FEDERAL QUESTION OF SINGULAR IMPORTANCE TO A SIGNIFICANT SEGMENT OF THE AMERICAN ECONOMY AND TO THE PUBLIC AS A WHOLE

1. On-line piracy of all types of copyrighted works "has reached epidemic proportions." *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1132 (N.D. Cal. 2002). "Every day, ordinary people download billions of files: blockbuster movies, cable TV shows, music, video games, software, and nearly every kind of copyright-protected material available in digital form." Kenneth Terrel & Seth Rosen, *A Nation of Pirates*, U.S. News & World Report, July 14, 2003, at 40, *available at* 2003 WL 2022009. There is no dispute that such unauthorized file-sharing constitutes copyright infringement, committed by millions of people "who are ignorant or more commonly disdainful of copyright and in any event discount the likelihood of being sued or prosecuted for copyright infringement." *Aimster*, 334 F.3d at 645.

Peer-to-peer file sharing services, such as those offered by Respondents, are used overwhelmingly to aid and abet such copyright infringement. They profit handsomely from, and would have no viable business but for, that infringement. And they take affirmative steps to ensure that such infringement

continues. Nevertheless, in the decision below, the Ninth Circuit held that these file-sharing services, by simply switching from a centralized index of files to a decentralized index of files, can avoid secondary liability for facilitating millions of acts of copyright infringement over the Internet. The fundamental issue raised by this case is whether the doctrine of secondary copyright liability, as enunciated in the 1984 *Sony-Betamax* decision, will have any practical meaning in a new digital world characterized by massive Internet piracy – or whether, as the Ninth Circuit determined, that doctrine contains an enormous loophole that rewards a mere technological sleight-of-hand.

2. The resolution of that issue has obvious importance to the Petitioners, which represent a broad cross-section of economic interests and which have been the prime targets of on-line copyright infringement. Petitioners consist of the major record and motion picture companies in the United States and a certified class of 27,000 music publishers and songwriters. Likewise, this case raises an important issue for Respondents' users, the millions of individuals engaged in ongoing copyright infringement. The outcome of this case, however, has considerable importance to numerous individuals and businesses in addition to those represented by Petitioners and Respondents – virtually all copyright industries, legitimate on-line services and the public as a whole.

Internet piracy and the decision below have a particularly pernicious effect on *Amici's* members and their efforts to provide the American public with creative product.

• *Motion Pictures and Television Programming*. Hundreds of thousands of motion pictures and television programs are available free of charge for unauthorized downloading on peer-to-peer networks.[3] By way of example, there were more than

3. *See AFMA Strikes Deal to Curb Internet Piracy*, TV Meets the Web, Mar. 12, 2002, *available at* 2002 WL 4473600; Jefferson Graham, *Online Trading of TV Episodes Grows*, USA Today, May 20, 2004, at B3, *available at* 2004 WL 58557143.

45,000 copies of the movie *Finding Nemo* available for unlawful file-sharing even *before* that movie was released for the home video market in November 2003.[4] "Illegal copies of virtually every new release – and even some films that have yet to debut in theaters – [are] turning up on the Internet."[5]

Widespread infringing distribution of motion pictures and other audiovisual programming through peer-to-peer networks has had a major impact on all participants in the motion picture and television industry. This includes the thousands of directors, producers, writers and actors represented by *Amici* the Directors Guild of America, Producers Guild of America, Inc., Writers Guild of America, west, Inc. and Screen Actors Guild. The pensions and other income that many of *Amici's* members receive are tied directly to sales of DVDs and other video product – the very sales that are displaced by the illegal file-sharing that Respondents and the decision below facilitate. Unlawful file-sharing also affects members of the Video Software Dealers Association, the retailers, distributors and suppliers of DVDs and videocassettes that derive revenue from the sale or rental of home videos. According to one estimate, it costs each of the thousands of video stores in the United States an average of $11,000 annually in lost revenues from the rental of home videos.[6]

• *Sports Programming*. Sports interests, such as those represented by *Amici* Major League Baseball and the National Basketball Association, are responsible for the production and

4. *See* Jill Kipnis, *Piracy's Next Victim: Video Biz*, Billboard, Jan. 10, 2004, at 3, *available at* 2004 WL 64808769.

5. *See* Lorenza Munoz & Jon Healey, *Pirated Movies Flourish Despite Security Measures*, Los Angeles Times, Dec. 4, 2003, at A1, *available at* 2003 WL 68902305.

6. *See Retailer Losses to Internet Piracy: We Do the Math*, at *http://www.vsda.org/Resource.phx/vsad/government/positionstatements/piracy-youdothemath.htx* (visited Nov. 4, 2004).

marketing of a variety of video and audio products. These products provide a means for fans to enjoy the highlights of past games, championship series and entire seasons as well as related new material. Increasingly, the leagues and their member clubs have used the Internet and the ease of access it provides to make available audio and video sports programming. For example, Internet users now can download from Major League Baseball's Web site copies of some of the classic games in Baseball history (such as Game 6 of the 1975 World Series), as well as recent games (such as the just-concluded World Series games between the Boston Red Sox and St. Louis Cardinals.)[7]

Sports interests have not been immune from the type of infringement at issue in this case; unlawful file-sharing is not limited to sound recordings and hit movies. For example, the NBA offers a two-volume DVD that contains full coverage of the Detroit Pistons' 2003-04 championship season, with game highlights, exclusive interviews, in-depth game analysis and behind-the-scenes action. That DVD is available for purchase on the NBA web site for $24.99. But unauthorized copies of the same DVD – as well as many other video and audio products that sports interests seek to market – are currently being made available, illegally and free of charge, to those who are part of the network of users established by Respondents. As consumers increasingly choose to avail themselves of the option afforded by the services that the Ninth Circuit has improperly immunized, sports interests will increasingly be deprived of the revenues (and the incentive) necessary to make that new product available to the public.

In *Sony-Betamax*, the Court relied upon testimony from sports leagues to support the conclusion that many copyright owners had no objection to the copying of their free over-the-air telecasts. *See* 464 U.S. at 443-44 & n.24. The situation here –

7. *See Digital Download Service 2004 Postseason*, at *http://mlb.mlb.com/NASApp/mlb/mlb/video/dds_sell.jsp* (visited Oct. 28, 2004).

where sports interests seek to sell their product to the very consumers that Respondents and others encourage to steal that product through unlawful file-sharing – is entirely different and calls for a result different than in *Sony-Betamax*. *Compare Sony-Betamax*, 464 U.S. at 421 ("the average member of the public uses a VTR [video tape recorder] principally" for lawful "time-shifting") *with* Pet. at 4 (90% of the activity on Respondents' services constitutes copyright infringement).

• *Literary Works*. *Amici* the Association of American Publishers, Inc., the Association of American University Presses and The Authors Guild, Inc. represent the creators and distributors of various types of literary works. *Amicus* Graphic Artists Guild represents, among others, illustrators and cartoonists whose creative efforts appear in literary works and other media.

At the present time, literary works are distributed and read in mainly printed form. However, electronic distribution of serial publications is increasingly important, and publishers are working diligently to promote the development of a robust e-book market. Greater availability and consumer acceptance of publications in electronic formats would expose publications to infringing online distribution in the same manner as sound recordings and motion pictures. As publishers struggle to develop markets for electronic publications and consider whether to make particular works available in electronic formats, they consider the effects of infringing distribution and the possibility that legitimate electronic distribution will lead to piracy that cannibalizes print markets. If the Ninth Circuit's decision below is not reversed, it will deter publishers from making works available in electronic formats and taking the other steps necessary to develop electronic markets for publications.

• *Video and Computer Games*. *Amici* Entertainment Software Association and Interactive Entertainment Merchants Association represent companies that, among other things,

publish and sell interactive entertainment software (including video and computer games). Much interactive entertainment software is susceptible to infringing online distribution in the same way, and with the same effects, as sound recordings and motion pictures. Infringing distribution of entertainment software, through peer-to-peer networks and otherwise, costs legitimate software vendors billions of dollars in lost sales, robbing game developers and the game industry of revenue that could be used to underwrite the creation and marketing of an even wider array of game titles.

For example, the Entertainment Software Association has since 1998 monitored Internet web sites, file transfer protocol sites, newsgroups, chat rooms and so forth for instances of piracy of its members' products. In the intervening years, it has obtained the takedown of more than 50,000 sites dealing in pirated entertainment software. On peer-to-peer networks, like those created and operated by the Respondents, every user is potentially an infringing distributor like the operators of these infringing sites. Thus, infringing distribution through peer-to-peer networks is more diffuse than in the case of site-based infringement, and enforcement against it is more difficult. If the Ninth Circuit's decision in this case is allowed to stand, peer-to-peer networks increasingly will eat into the legitimate entertainment software market.

• *Photographic Works*. The extraordinary pace of improvements in digital technology in recent years has opened up new opportunities for distributing fine-quality photographic images via the Internet. While the speed and quality of photographic transmissions has benefited publishers and photographers alike, the ease with which photography files can be distributed creates substantial risks for professional publication photographers and other small copyright owners whose livelihoods depend to a substantial degree on commercial exploitation of their copyrights in photographic images. File-

sharing technology magnifies that risk, particularly given the size and quality of digital file transfers, including photography.

Amici The American Society of Media Photographers, Inc. and the Professional Photographers of America, Inc. represent the copyright interests of photographers working in a wide range of media and industries. For their members, the protection and enforcement of copyright rights are already difficult enough, given the expense and time required to litigate a copyright infringement action. If, under the Ninth Circuit's decision in this case, photographers cannot bring an infringement action against those who develop and distribute file-sharing technology used to commit widespread infringement, protection of photographers' copyrights will move from difficult to impossible.

3. The harm from unauthorized file sharing will grow exponentially as increased use of broadband access to the Internet, more powerful computers and improved compression technology significantly reduce download time.[8] That increased harm will be experienced by virtually all copyright owners and by those who rely upon income from the use of copyrighted works. If the Ninth Circuit's decision is allowed to stand, a major weapon in the arsenal to combat Internet piracy – the ability to hold liable those who like Respondent facilitate millions of acts of such piracy – will be lost (at least against those file-sharing services such as Respondents that do business in the Ninth Circuit and avoid doing business in the Seventh Circuit).

When copyright protection fails, the resulting diminution in the incentive for an author to "release to the public . . . the products of his creative genius" (*United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948)) has very real effects on the public. Under the decision below, there not only will be less

8. *See* George Cole, *Big Studios Unite in War on Internet Pirates*, Financial Times, July 6, 2004, at 9, *available at* 2004 WL 85136097; *Tipping Hollywood the Black Spot – the Digital Threat to Hollywood*, Economist, Aug. 30, 2003, at 43, *available at* 2003 WL 58583842.

economic opportunity for the creators and distributors of copyrighted works, but less creative product for the public to enjoy. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) ("[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.").

II. THE COURT SHOULD NOT WAIT FOR CONGRESS TO CLARIFY THE COURT'S 1984 SONY-BETAMAX STANDARD IN A DIGITAL ENVIRONMENT

The Ninth Circuit suggested that Congress, not the courts, should reexamine the secondary copyright liability doctrine to deal with "specific market abuses" and "internet innovation." Pet. App. at 21a. That suggestion ignores the Ninth's Circuit's own admonition in another case where it rejected a lower court's determination to "leave it to the legislature to fashion an appropriate statutory scheme," explaining:

> The legislature, of course, is always free (within constitutional bounds) to refashion the system that courts come up with. But that doesn't mean we should throw up our hands and let private relations degenerate into a free-for-all in the meantime. We apply the common law until the legislature tells us otherwise. *And the common law does not stand idle while people give away the property of others.*

Kremen v. Cohen, 325 F.3d 1035, 1036 (9th Cir. 2003) (emphasis added) (internal quotation marks and citation omitted). Furthermore, the suggestion that the issue raised by this case should be left to Congress ignores the nature and history of secondary liability in copyright law, the role of the courts in developing the doctrines they create, and the realities of the political process.

1. The doctrine of secondary copyright liability is a judge-made doctrine; the courts, not Congress, have created and developed principles of secondary liability in copyright law for more than a century. As early as 1886, a court held a defendant liable as a "joint tort feasor" for supplying a third party with the means to make unauthorized copies of the plaintiff's newspaper. *See Harper v. Shoppell*, 28 F. 613 (C.C.S.D.N.Y. 1886). In 1911 this Court recognized secondary copyright liability to deal with what was then a relatively new technology, holding the producer of a motion picture liable for dramatization of a literary work even though others exhibited the picture to the public. *See Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62-63 (1911) (Holmes, J.). In the lower courts, two distinct theories of secondary liability emerged: "vicarious liability" and "contributory infringement." The Court in *Sony-Betamax* cited these doctrines approvingly, and recognized that their application involves the typical problem in judicial decision making of "identifying the circumstances in which it is just to hold one individual accountable for the actions of another." 464 U.S. at 435.

Congress, by contrast, has been a mere bystander as the courts formulated and applied the common law doctrine of secondary copyright liability. Nothing in the Copyright Act of 1909 or its predecessor legislation even refers to secondary liability. And, in the Copyright Act of 1976, Congress did no more than state that copyright owners have the right "to authorize" others to exploit the rights in Section 106 of the Act, 17 U.S.C. § 106, explaining only that use of the words "to authorize" in Section 106 is "intended to avoid any questions as to the liability of contributory infringers." H.R. Rep. No. 94-1476, at 61 (1976); *see also id.* at 159 (noting that it rejected a proposed amendment because vicarious liability is a "well-established principle of copyright law"); 17 U.S.C. § 512(c)(1)(A), (B) (codifying safe harbors based on secondary liability case law); *id.* § 1201(c)(2) (stating that the section does not "enlarge or diminish vicarious or contributory liability for

copyright infringement in connection with any technology, product, service, device, component or part thereof").

Given the history of the secondary copyright liability doctrine, it is wrong to suggest, as the Ninth Circuit has done, that the courts should wait for Congress to apply that doctrine where "specific market abuses" are caused by "internet innovation." Pet. App. at 21a. Indeed, the courts frequently have held that defendants are or may be secondarily liable in cases involving different types of on-line infringement (in addition to the *Aimster* and *Napster* cases involving file-sharing).[9] As the Court has noted, copyright law "should not be . . . so narrowly construed as to permit . . . evasion because of changing habits due to new inventions and discoveries." *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 395 n.16 (1968) (citation omitted).

2. This case raises questions concerning the standard of secondary copyright liability that was adopted by the Court in *Sony-Betamax*. The principal issues here, on which there is a circuit conflict, concern (a) the nature of the showing that must be made to establish "substantial" or "commercially significant" noninfringing uses (*Sony-Betamax*, 464 U.S. at 441) and (b) the consequences of making that showing. *See* Pet. at 24-29. Those issues involve proper analysis of the Court's decision in *Sony-Betamax* – a task that the Court is well suited to undertake.

The Court undertook precisely the same type of task in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), where a question was raised as to another aspect of the Court's decision in *Sony-Betamax*. In *Sony-Betamax*, the Court stated that "every

9. *See, e.g., Sega Enters., Ltd. v. MAPHIA*, 948 F. Supp. 923 (N.D. Cal. 1996); *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503 (N.D. Ohio 1997); *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999); *Arista Records, Inc. v. MP3Board, Inc.*, 2002 Copyright L. Dec. (CCH) ¶ 28,483 (S.D.N.Y. Aug. 29, 2002); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146 (C.D. Cal. 2002).

commercial use of copyrighted material is presumptively . . . unfair . . . ." 464 U.S. at 451. The court of appeals in *Campbell* read that statement literally and concluded that the commercial nature of 2 Live Crew's parody of "Oh, Pretty Woman" rendered it presumptively unfair. 510 U.S. at 594. This Court, however, carefully analyzed the *Sony-Betamax* statement in the context of a factual setting much different than *Sony-Betamax* and determined that the court of appeals had misconstrued *Sony-Betamax*. *See* 510 U.S. at 584-85, 591, 594.

The Court in this case is being asked to clarify and to apply its own *Sony-Betamax* standard in a factual setting that (as in *Campbell)* bears little resemblance to the setting in *Sony-Betamax*, where that standard was articulated. Petitioners already have discussed the many factual differences between *Sony-Betamax* and the present case (*see* Pet. at 17-24), and that discussion will not be repeated here. It should be noted, however, that in focusing on some of the same differences, the Register of Copyrights stated:

> These facts make the comparison [of Respondents' peer-to-peer services] to *Sony* remarkably inapt. In my view, if the VCR had been designed in such a way that when a consumer merely turned it on, copies of all of the programs he recorded with it were immediately made available to every other VCR in the world, there is no doubt that the *Sony* decision would have gone the opposite way.

Register's Statement, *supra* note 2, at 6. As the Register's remarks suggest, the advent of the digital age, with the opportunity for copyright infringement of an unprecedented nature and scope over the world-wide Internet, presents this Court with an entirely different and more compelling context for applying its doctrine of secondary liability.

3. The Register of Copyrights made the above statement in support of legislation in the Congress now ending to make

clear that peer-to-peer services such as Respondents are liable for the copyright infringements that they induce. She testified that legislation would be appropriate because the doctrine of secondary copyright liability "has become confused as courts have struggled to apply the existing common law doctrines to new peer-to-peer services, with conflicting results." *Id.* at 1; *see also id.* at 2 (referring to "confusion in the courts"); *id.* at 6 ("application of the secondary liability doctrines in the peer-to-peer context has produced conflicting results").

As the Register observed, the Seventh Circuit's decision in *Aimster* directly conflicts with the district court's decision in this case (which, at the time of her testimony, had not yet been decided by the Ninth Circuit). The Register explained her view that the district court had "misapplied the *Sony* decision" and "wrongly decided" the case, "fail[ing] to see the forest for the trees." *Id.* at 6. In the Register's opinion, the "court employed an unnecessarily cramped view of existing secondary liability doctrines, creating a much narrower test . . . than any case before it . . . ." *Id.* at 6. *Compare* Pet. App. at 8a (Ninth Circuit stated that it "agree[s] with the district court's well reasoned analysis" without discussing the views expressed by the Register). The Register concluded that the proposed legislation "would help correct the problems created by the *Grokster* court's misapplication of *Sony* and secondary liability doctrines in the peer-to-peer context." *Id.* at 7.

Nevertheless, the bill faced stiff opposition, and efforts to reach a compromise eventually foundered.[10] Because secondary liability is so well established through judicial decision making, any legislation that might be perceived as changing the legal

10. *See* Declan McCullagh, *Tech Firms Rally Against Copyright Bill*, CNETNews.com, Sept. 28, 2004, at *http://news.com.com/Tech+firms+rally+against+copyright+bill/2110-1028_3-5387639.html* (visited Oct. 25, 2004); Keith Regan, *Congressional Action on Induce Act Could Be in Jeopardy*, Tech News World, Oct. 7, 2004, at *http://www.technewsworld.com/story/news/37169.html* (visited Oct. 25, 2004).

status quo would require an act of considerable political will. In the face of such entrenched political interests, it is simply unrealistic to expect that Congress will do anything other than direct the parties to the courts. The Court should not abdicate its role as the patriarch of the secondary copyright liability doctrine in the vain hope that Congress will assume that role and deal with the confusion caused by conflicting judicial interpretations – particularly where, as here, Congress has already shown that it is unable to act.

III. THE DECISION BELOW, IF ALLOWED TO STAND, WILL BURDEN THE JUDICIAL SYSTEM WITH MULTIPLE INDIVIDUAL INFRINGEMENT ACTIONS AND DEPRIVE COPYRIGHT OWNERS OF A MEANINGFUL REMEDY FOR MILLIONS OF ACTS OF ON-LINE COPYRIGHT INFRINGEMENT

1. The Ninth Circuit's decision provides copyright owners with only one, highly unsatisfactory option for seeking redress for the millions of acts of copyright infringement that are facilitated by Respondents' services – copyright owners can file lawsuits against individual infringers. That is the course of action that the recording industry has pursued since the district court in this case first absolved Respondents from secondary liability. During the past year, record companies have filed copyright infringement actions against more than 6000 individual infringers.[11] The motion picture industry recently announced that it likewise will begin suing individual infringers.[12] The industry's experience with such litigation highlights the intense problems with the decision below – both from the copyright owners' perspective and from the perspective of judicial administration.

11. *RIAA Files New Lawsuits Against 750 Illegal File Sharers*, at *http://www.riaa.com/news/newsletter/102804.asp* (visited Nov. 5, 2004).

12. *Studios to Begin Suing Illegal Film File Swappers*, at *http://www.mpaa.org/CurrentReleases/* (visited Nov. 5, 2004).

The recording industry has faced significant and costly obstacles in pursuing individual infringers. It is, of course, difficult to identify those infringers because they act anonymously or pseudonymously when sharing files over the Internet. The difficulties have been exacerbated by judicial decisions that preclude copyright owners from taking advantage of provisions in the Digital Millennium Copyright Act that require Internet Service Providers to identify specific infringers in response to requests from copyright owners. *See Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003), *cert. denied*, No. 03-1722, 2004 WL 2282255 (Oct. 12, 2004); No. 03-1579, 2004 WL 2050507 (Oct. 12, 2004). Copyright owners have thus been forced to file cumbersome "John Doe" suits and then serve subpoenas (often contested) to obtain the infringers' identities.

Some courts have made the prosecution of "John Doe" actions even more problematic. They have determined that copyright owners may not bring one action seeking the identities of multiple "John Doe" customers of a single ISP, but rather must sue each individual infringer separately. *See BMG Music v. Does 1-203*, No. 04-650 (E.D. Pa. Mar. 5, 2004) (prohibiting joinder and requiring two-hundred and three separate John Doe complaints); *Interscope Records v. Does 1-25*, No. 6:04-CV-197-ORL-22-DAB (M.D. Fla. Apr. 27, 2004) (same); *see also Elektra Entertainment Group, Inc. v. Does 1-6*, No. 04-1241 (E.D. Pa. Oct. 13, 2004) (infringers may contest subpoenas to ISPs seeking disclosure of infringers' identities). Decisions such as these have imposed considerable and unnecessary costs on both copyright owners and the judicial system – all as a result of the decisions below.

2. The possibility of instituting individual copyright infringement actions against a multitude of individuals engaged in unlawful file-sharing is simply not a viable option for *Amici* and their members. The costs and burdens of such litigation – as reflected in the recording industry's experience – are

overwhelming. Particularly for many small and individual copyright owners, it is not feasible, financially or otherwise, to bring enforcement actions against users of file-sharing technology. Deprived of any practical remedy to protect their copyright interests against the onslaught of file-sharing technology, many copyright owners would find their copyrights useless in a digital environment and their ability to exploit and protect their work endangered.

That is precisely why the doctrine of secondary copyright liability has emerged. As the court in *Aimster* observed, "Recognizing the impracticability or futility of a copyright owner's suing a multitude of individual infringers, the law allows a copyright holder to sue a contributor to the infringement instead." 334 F.3d at 645 (citation omitted). The Register of Copyrights has likewise observed that the secondary copyright liability doctrine is

> *critical to the effective functioning of our copyright system, and even more so in the new digital environment.* [That doctrine] allow[s] copyright owners to focus their enforcement (and licensing) efforts on those entities that foster infringing activity and have the resources and wherewithal to either pay licensing fees or satisfy an infringement judgment, without bringing costly, time-consuming and usually futile actions against multiple, mostly judgment-proof individual defendants.

Register's Statement at 2 (emphasis added). The decision of the Ninth Circuit below improperly deprives copyright owners of the ability to rely upon the secondary liability doctrine. In doing so, it effectively deprives copyright owners of any viable means to redress countless acts of infringement.

Amici strongly believe that the Ninth Circuit erred when it misapplied the *Sony-Betamax* doctrine to exempt Respondents from secondary liability. Regardless of the merits of the court's

ruling, however, the consequences of that ruling are clear. As discussed above, the court has rendered a decision that imposes substantial costs on our judicial system and participants in that system; permits and encourages rampant piracy of copyrighted works over the Internet by exempting from liability those who make that piracy possible; and effectively denies copyright owners the ability to enforce rights granted by the copyright clause of the Constitution and implementing federal copyright laws. At the very least, such a decision warrants review by this Court.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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